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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING PART TWO OF THE FIRST INSTALMENT OF CLAIMS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (CATEGORY "F" CLAIMS)

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Introduction

1. The Panel of Commissioners responsible for category "F" claims (the "Panel") was appointed by the Governing Council of the United Nations Compensation Commission at its twenty-first session on 22-23 July 1996. On 20 March 1997, the first instalment of eleven "F" claims was submitted to the Panel. In a procedural order dated 21 March 1997, the Panel noted its decision to classify two of the claims in the instalment as "unusually large or complex" claims, pursuant to article 38(d) of the Provisional Rules for Claims Procedure (the "Rules"). 1/ On 20 September 1997, the Panel issued its report and recommendations concerning part one of the first instalment of claims by Governments and international organizations (the "First 'F' Report"). 2/ The recommendations of the Panel were approved by the Governing Council on 17 December 1997. 3/ This report contains the Panel's findings and recommendations regarding the two remaining claims of the first instalment.

2. The claims considered in this report were filed on 18 March 1994 by the Government of Kuwait on behalf of the Kuwait Ministry of Foreign Affairs (the "Ministry") and Kuwait University (the "University") (collectively the "Claims" and the "Claimants"). They are the first Government claims submitted by Kuwait to be reviewed by a panel of Commissioners. The Ministry seeks compensation in the amount of US$34,948,111.00 plus interest. Its submission consisted of a one volume statement of claim and three volumes of supporting documents, including reports by expert accounting and engineering firms, witness statements and various documents. The University seeks compensation in the amount of US$25,263,186.00 plus interest. Its submission consisted of one large volume containing a statement of claim as well as reports by expert accounting and engineering firms, witness statements, various other documents and a video tape entitled "Direct Losses of Kuwait University as a Result of Iraqi Aggression". Both Claimants stated that additional documents supporting the Claims were held in the Government Claims Document Repository of the Public Authority for the Assessment of Compensation for Damages Resulting from Iraqi Aggression ("PAAC") and were available for inspection by the Commission.

3. The Executive Secretary of the Commission included the Claims in his report to the Governing Council dated 31 July 1996. In accordance with article 16 of the Rules, the report was circulated to the members of the Governing Council, to the Government of the Republic of Iraq ("Iraq"), and to Governments and international organizations that had submitted claims. Pursuant to article 32, paragraph 1, of the Rules, a number of Governments, including Iraq and Kuwait, submitted additional information and their views on the Executive Secretary's report to the secretariat, which transmitted them to the Panel.

I. PROCEEDINGS

4. On 21 March 1997, the Panel issued its first set of procedural orders with respect to the Claims. The orders had three primary components.

First, they classified the Claims as "unusually large or complex", thereby giving notice that they would be reviewed within twelve months. Second, the orders requested that the Claimants submit to the Commission a list of all documents supporting the Claims that were held in the PAAC document repository. Third, the orders instructed the secretariat to transmit to Iraq the statements of claim and all supporting documents submitted by the Claimants. Pursuant to article 36 of the Rules, the Panel invited Iraq to submit by 19 September 1997, a response to the statements of claim together with all documents Iraq intended to rely upon in the proceedings. On the Panel's instructions, the secretariat transmitted copies of such orders to the Claimants and Iraq.

5. On 12 April 1997, the Claimants submitted lists of documents held in the Document Repository with a brief description of each document. With the assistance of the secretariat and expert loss adjusting consultants retained by the Commission, the Panel reviewed the Statements of Claim, the supporting documents and the lists of documents submitted by the Claimants in response to the first set of procedural orders. Following this review, on 30 June 1997, the Panel issued a second set of procedural orders which requested that the Claimants supply the Panel with additional information and documents necessary to verify the Claims. On 24 September 1997, the Claimants submitted documents and written responses to the June orders.

6. On 5 September 1997, counsel for Iraq submitted a written request for an extension of the time limit set by the Panel for Iraq to file its responses to the Claims. The request was based on the ground that Iraq had encountered certain problems beyond its control in retaining counsel and its efforts to prepare a response had thus been delayed. In view of the unusual circumstances set forth in the request and because the granting of an extension of time in this specific case would not prevent the Panel from completing its review of the Claims within the prescribed time limits, the request for an extension was granted and Iraq was given until 14 December 1997 to file its responses and supporting documents.

7. The same order also gave notice to the Claimants that the Panel intended to have an on-site inspection in Kuwait. From 28 November to 3 December 1997, an inspection team comprised of an accountant, a loss adjuster, a quantity surveyor and two secretariat legal officers performed the on-site inspection at the Claimants' premises in Kuwait.

8. On 2 December 1997, Iraq filed its response to the Ministry's Statement of Claim. Iraq did not file any documents or evidence in support of its written response. Thereafter, Iraq filed its response to the University's Statement of claim. Iraq also commented on the requests for additional information and documents directed to the University that were set forth in the Panel's 30 June 1997 Procedural Order. Iraq's response was supported by written statements from Professor Akram M. Subhi, the President of the University of Basrah, and Dr. Mahir Ismail Ibrahim Al-Ja'afari, the Under-Secretary of the Ministry of Education, both of whom

worked as Iraqi officials at the University during part of the occupation of Kuwait.

9. In its proceedings, the Panel held regular sessions with the assistance of the secretariat. These sessions were conducted in private at the Commission's headquarters in Geneva. Pursuant to article 34 of the Rules, the secretariat provided administrative, technical and legal support to the Panel. As already noted, expert loss adjusting consultants were retained by the Commission to assist the Panel and the secretariat in reviewing the Claims.

II. THE CLAIMS

10. Pursuant to Governing Council decision 7, 4/ the category "F" claim form used by Governments for submitting their claims classifies losses under eleven headings. The claims considered in this report are briefly described below by loss type. The amounts claimed for the various losses are summarized in paragraph 84 below.

A. The Claimants' contentions

1. The Ministry of Foreign Affairs

(a) Real property

11. The Ministry's real property damage claim relates to damage at its headquarters in Kuwait City, its Embassy to Iraq in Baghdad and its Consulate in Basra, Iraq.

12. According to the Claimant, at the time of the invasion, the Ministry "occupied modern facilities built in 1983 and situated on the Arabian Gulf in the heart of Kuwait City". The Claimant asserts that the

> "Iraqis arrived at the Ministry building at 11:00 a.m. on the morning of the 2nd of August.... After the takeover of the Ministry building, the Iraqis camped out in the offices, turning them into squalid living quarters. While there, they perpetrated a systematic theft of the building's contents, stripping everything of value for shipment to Iraq."

13. The Claimant states that, following the liberation of Kuwait, it was required to repair "windows, doors and the interior and exterior surfaces of the building, as well as the Ministry's special vaults". The repair work also involved "restoring the electrical and communications equipment and automation systems that formed part of the building's fixtures". The Claimant contends that the "basic measure of Kuwait's real property losses for the Ministry ... is what it has cost, or will cost, Kuwait to perform the necessary repairs".

14. The Claimant states that Kuwait's Embassy and the residence of its Ambassador in Iraq were "located on parcels of land ... that were transferred to the State of Kuwait by Iraq. Kuwait does not make a claim here for the land in Baghdad, because that land still legally belongs to Kuwait". In 1989 Kuwait built a new Embassy and Ambassador's residence on that land in Baghdad.

15. The Ministry claims that "[n]o one from Kuwait has had access to the Embassy in Baghdad since the unlawful invasion of Kuwait by the Iraqi regime in 1990". Thus, it concedes that "there is no way of knowing exactly what the condition of the structure now is". The Claimant now "asserts a claim for the loss of use of its Embassy in Baghdad based upon the cost of construction, less depreciation".

16. Prior to the invasion of Kuwait, the Ministry also maintained a Consulate in Basra. Like its Embassy, the Consulate "was originally located on land belonging to the State of Kuwait". The Consulate building was, however, "damaged in the war between Iraq and Iran and at the time of Iraq's invasion of Kuwait" and had not been repaired. Accordingly, the Claimant had been renting other office space for its Consulate in Basra. The Ministry now asserts a claim for the "loss of use" of its damaged Consulate building. It also seeks compensation for the rent that it prepaid for its rented Consulate offices.

(b) Tangible property

17. As noted above, the Claimant states that "Iraqi forces systematically removed" from the Ministry headquarters

> "... almost every removable piece of property, including priceless historical papers, furniture, computers, telecommunications equipment (including special encoding equipment for diplomatic messages), vehicles, historical papers, the library collection, valuable State gifts and the currency in the Ministry's safe".

18. In its statement of claim, the Ministry summarized each of the categories of tangible property stolen or damaged at its headquarters and the methods that it used to measure the loss of the various items.

19. The Ministry also claims that it possessed furniture and vehicles at its Embassy in Baghdad and its Consulate in Basra. It states that "all of these items were in Iraq at the time of the invasion ... [and] Kuwait has been unable to use these assets ... [or] to perform maintenance that would be necessary to preserve them ..." The Claimant contends that the valuation of this loss should be the "purchase price of the assets" less depreciation.

(c) Payment or relief to others

20. The Ministry states that the "Council of Ministers of the State of Kuwait" adopted a resolution on 28 April 1991 requiring the Claimant and other Government ministries to pay "salaries for the seven-month occupation period and the three month emergency period immediately following the liberation to its [Kuwaiti] employees ..." The purpose of paying these back salaries was to help "alleviate [the employees'] suffering and financial hardship as a result of the Iraqi invasion and occupation". The Ministry now seeks compensation in the amount of the relief payments that it was required to pay to its Kuwaiti employees by the Government of Kuwait.

(d) Public service expenditure

21. The Ministry claims that it has "incurred additional cost since liberation re-creating the record of Kuwait's treaties with Iraq, which were all stolen or destroyed, and reverting to a manual system of archiving its records pending delivery of a new computer". With respect to the allegedly lost treaties, the Claimant states that "a special project had to be undertaken after liberation to recreate this lost record". According to the Claimant, most "of this work has taken place in Paris, where special advisors were retained to carry out this important work". The Claimant alleges that as a consequence of the destruction of its treaty record, Kuwait needed to send "ambassadors around the world to distribute and explain the treaties and documents recreated in Paris so that Kuwait's borders with Iraq can be reconfirmed".

22. The Ministry claims that it incurred other costs due to the loss of its archiving computer when it employed "five people for 2 ½ years" after the liberation to manually archive documents.

(e) Interest

23. The Ministry claims interest in the amount of US$5,554,080.00 on its claim.

2. Kuwait University

(a) Real property

24. According to the Claimant, at the time of Iraq's invasion and occupation of Kuwait, the University had nine colleges located on five campuses in and around Kuwait City. The University claims that following the invasion of Kuwait, Iraq turned the University into a military post. It states that "[t]renches and bunkers were dug in the campus plazas and gardens and Iraqi troops lived in and controlled access to the University facilities". The Claimant asserts that, during the period of the occupation, its facilities

> "... were systematically looted, vandalized and destroyed. Every piece of useful furniture, equipment and machinery was stolen from University classrooms, laboratories and offices. University buildings suffered internal and external damage ... such as smoke and burn damage from fires, broken doors and windows, smashed walls, floors and ceilings. Plumbing, air conditioning, heating and electrical parts and building fixtures were ripped out of many buildings and stolen".

25. After the liberation of Kuwait, the Claimant commenced an "Emergency Plan involving intensive and costly repairs to the University facilities" in an effort to re-open the University for the 1991 autumn term and to take care of the most urgent repairs. The University claims that it executed "167 contracts for repair of University facilities damaged during Iraq's invasion and occupation of Kuwait" and contends that the "measure of [the University's] real property loss is the cost to repair damages caused as a result of Iraq's invasion and occupation of Kuwait". Accordingly, it seeks reimbursement for the money expended with respect to the 167 repair contracts.

(b) Contract

26. In addition to the physical damage to the University premises, the University claims that "Iraq's occupation of [the University] also resulted in the interruption of ongoing construction projects for upgrading of University facilities". The Claimant contends that at the time of the invasion two construction projects were in progress but that the contracts were "halted on 2 August 1990 as a result of the invasion and accompanying breakdown in civil order". Both contracts were also terminated on that date "[p]ursuant to Order No. 148 of Kuwait's Council of Ministers, meeting in exile on 27 January 1991".

27. After the liberation of Kuwait, the construction company, whose contracts had been terminated, "refused to work on the projects for the original contract prices; rather it demanded a substantial price increase over the original contract amounts to account for increased labor and material costs in Kuwait". The University "decided to negotiate with [the contractor] rather than publicly tender completion of the projects ... [and] agreed to a 12.5% increase over the original contract amount on each contract ... to complete the two interrupted projects".

28. The Claimant argues that the proper measure of its "contract losses is the amount over the original contract prices that the University had to pay to complete the projects interrupted by Iraq's invasion of Kuwait".

(c) Interest

29. The University claims interest in the amount of US$4,014,760 on its claim.

B. Iraq's responses

1. The Ministry of Foreign Affairs' claim

(a) Real property and tangible property

30. Iraq's response raises a number of general and specific objections to the Ministry's real property damage and loss of tangible property claims. In essence these objections are summed up by Iraq's argument that many of the alleged losses "lack proper evidence and documents. The claim which is not supported by substantive documents does not give the Claimant any right to compensation."

31. Furthermore, Iraq challenges the probative value of the witness statement of the Ministry's maintenance engineer, Mohammad Latif Chohan, noting that in many instances his testimony is not corroborated by documents.

32. With respect to the Ministry's claim for loss of use of its Embassy and its Ambassador's residence in Baghdad, Iraq states that the "two buildings are in normal condition". Iraq also states that the "status of these two buildings is similar to the status of the Embassies of other states which severed their diplomatic relations with Iraq". Moreover, Iraq concedes that the "two buildings are Kuwaiti property that Kuwait can use after the resumption of the normal relations between the two countries".

33. The Claimant cannot, Iraq contends, claim that it has lost any tangible property at the Embassy "unless the Kuwaiti side checks the Embassy's assets in order to determine the losses". Iraq then notes that it "has a large building for its Embassy in Kuwait, as well as the residence of the Ambassador, including their furniture, cars and other assets. They are now in the possession of the Kuwaiti authorities". According to Iraq, both the Kuwaiti Embassy in Baghdad and the Iraqi Embassy in Kuwait "and their assets are subject to the provisions of the Vienna Convention on Diplomatic Relations of 1961 rather than the mandate of the UNCC".

34. Iraq also argues that the Ministry's claim for compensation for the rent that it paid for the Basra Consulate offices "is considered as indirect damage. Consequently, it is not subject to the mandate of the UNCC". Iraq suggests another forum for the Claimant to pursue its claim, stating that the "lessee can raise the issue before the Iraqi courts within the framework of the lease agreed upon and in accordance with the principle saying that 'contract is the law of the contracting parties.'"

(b) Payment or relief to others

35. Iraq makes two arguments in response to the Claimant's request to be reimbursed for the back-salaries that it paid its employees. First, Iraq

contends that the "claim does not fall within the [meaning of] direct damage" set forth in Security Council resolution 687 (1991) and, therefore, is not compensable. A second related argument is that the payment of back salaries "relates to the period after Iraq's withdrawal from Kuwait" and Iraq's "responsibility for compensation should be confined to the period of 2 August 1990 to 2 March 1991".

(c) Public service expenditure

36. Iraq contends that the money "paid as an award to the experts who demarcated the borders between Iraq and Kuwait" as well as the cost of "diplomatic activity done by the Kuwaiti Ministry of Foreign Affairs to explain the reasons of the decision demarcating the borders between Iraq and Kuwait" constitute "indirect damages and losses or [are] irrelevant". Thus, such losses, according to Iraq, do not fall within the jurisdiction of the Commission, which is "confined to direct damage or losses resulting from [Iraq's] entry into Kuwait" by paragraph 16 of the Security Council resolution 687 (1991). Iraq takes the same position with respect to the cost incurred by the Ministry to manually archive documents following the liberation of Kuwait.

2. Kuwait University's claim

(a) Real property

37. Iraq's response raises a number of arguments that can be reduced to four basic objections on the merits of the real property damage claim. First, Iraq argues that the "University buildings did not suffer the claimed damage". "We have to bear in mind," asserts Iraq, "that the members of the working teams of the Iraqi Ministry of Higher Education and Scientific Research who were then in Kuwait carried out maintenance and repair so that the University would be able to receive students at the official date for the commencement of the academic year".

38. Second, Iraq asserts that it was not responsible for any damage that did occur to the University.

> "When the Iraqi Team began cooperating to direct Kuwait University for the year 1990/1991, a survey on the conditions of the University buildings in various sites in Kuwait has been made. Afterwards, engineers and technicians have been committed to make necessary preparations for the new academic year. The steps undertaken can be epitomized as follows: The field survey, accomplished on 29 August, 1990, has verified that there were University buildings and utilities scattered in Khaldiyya, Kaifan, Adailiyya, Shwaikh, and the College of Medicine in Jabiyya, listed by the University Administration prior to 2 August, 1990 for maintenance. Some of these include electric lifts services, airconditioning stations, water pumping stations, repairing labs and some study halls, etc. Some offices, together

with equipment, have been exposed to damage or stealing, as the security men and watchmen of the University offices left their jobs for the period 2-25 July, 1990. This has also been caused by the bad behaviour and disloyalty of a large number of non-Kuwaitis and watchmen who have joined work on 25 August, 1990".

39. Another witness statement asserts that the damage was caused by "Kuwaiti gangs and their agents [who] committed destruction and assassinated several citizens, students and teaching staffs among whom was Dr. Falih, dean of the College of Administration after the explosion of the hotel beside the American embassy, the fire in the College of Science and the theft of some possessions".

40. The same witness went on to note in his statement that when he left Kuwait on 13 January 1991, the University buildings were in good condition. He then speculated that the damage to the University may have occurred after his departure and could have been caused by "gangs or their guards and servicemen or as a result of military operations since Kuwait was considered a battlefield".

41. Third, Iraq contends that by permitting the repair contracts to be placed "by direct order instead of public tender" the University failed to "minimize the loss to the least possible amount and to take reasonable measures to avoid any possible increase in damages". According to Iraq,

> "... the fact that the contracts were executed by direct order ... led to an unnecessary increase in the cost of implementing the works due to lack of knowledge of the prices of competing contractors. Further these procedures open the door for opportunities of exploitation to serve personal interests".

42. Fourth, Iraq argues that the contracts underlying the claim include costs that are not directly related to any damage that occurred during the period of Iraq's occupation of Kuwait. It asserts that the contracts "covered comprehensive maintenance of the buildings and adding extensions to existing ones". Along these lines, Iraq claims the University does not explain how the percentage of repair contracts attributable to Iraq have "been worked out or mention how the engineering team has determined the absence of any additional costs that exceed the damage caused by Iraq's presence in Kuwait". Furthermore, Iraq contends that "there is no mention of any method for working out percentages of depreciation in property and in other fixed assets".

(b) Contract

43. Iraq makes two arguments on the merits of the University's contract interruption loss claim. First, Iraq argues that at the time of the invasion, the contractor had "been too slow in executing the contracts and therefore there is no justification to sign new contracts with it".

Second, Iraq contends that "the new contracts overlooked the materials that had already been provided in the work sites during the execution of the earlier two contracts".

44. Finally, with respect to both the real property and contract interruption losses, Iraq challenges the probative value of the Claimant's witness statements. Iraq argues that, as Kuwaiti nationals, the witnesses are unduly biased against Iraq. Furthermore, because the witnesses were either outside Kuwait or had limited access to the University premises during the occupation, Iraq claims that they lack personal knowledge of the facts stated in their witness statements.

III. LEGAL FRAMEWORK

45. In the First "F" Report, the Panel discussed the legal framework within which the claims of Governments and international organizations would be decided by the Commission. This discussion covered the law applicable to the category "F" claims, the procedural and evidentiary requirements imposed on the Claimants and the Panel's role in the proceedings. 5/ The claims covered by this report, though classified as unusually large or complex, have been considered within the same legal framework as the claims previously reported upon by the Panel.

IV. COMPENSABILITY

A. The Ministry of Foreign Affairs

1. Unsubstantiated losses

46. Several losses within the Ministry's claim are not adequately supported by evidence.

(a) Tangible property

47. First, the Claimant did not produce, in support of its claim for the loss of a historical document collection, a list of the documents constituting the collection or any other evidence to substantiate the claim, even though the purported sale of the documents to the Claimant by a European Government took place relatively recently in 1985.

48. Likewise, the Claimant did not furnish any evidence, other than two unspecific witness statements, in support of its claim that gifts that had been given to the Ministry by foreign dignitaries had been looted by Iraq. Other than stating that "[m]any of the givers of the gifts are dead, and some of the countries they represented no longer exist," the Claimant was unable to identify any of the foreign dignitaries that bestowed the gifts, describe any of the gifts or state the occasions upon which the gifts had been given.

49. Similarly, the Ministry's statement that large amounts of cash were taken from its safes by Iraqi forces is not supported by a particularized statement of claim or by any appropriate evidence. 6/

50. Finally, the Ministry's claim for the loss of tangible property at its Embassy and Ambassador's residence in Baghdad and its Consulate in Basra is not supported by any documentary or other appropriate evidence demonstrating that Iraq has failed to respect and protect the premises of Kuwait's diplomatic property in Iraq, including the Claimant's tangible property and archives. According to the Claimant, the lack of evidence in support of this loss is due to the fact that its personnel are barred from visiting Iraq. In response to the Panel's procedural order, however, the Claimant stated that "Kuwait has not entrusted the custody of its Embassy in Baghdad [and Consulate in Basra] to a third State acceptable to Iraq".

51. In light of the foregoing, the Panel is unable to recommend compensation for the above-mentioned losses because they are not supported by documentary or other evidence sufficient to demonstrate the circumstances and amount of the claimed losses. 7/

2. Indirect losses

52. Several losses within the Ministry's claim do not constitute direct losses within the meaning of Security Council resolution 687 (1991).

(a) Real property

53. The Ministry requests compensation for the "loss of use" of its Embassy and Ambassador's residence in Baghdad and for the "loss of use" of a Consulate building in Basra that has been unoccupied since the Iran-Iraq war when it suffered war damage. The Ministry also seeks compensation for rent that it prepaid on Consulate offices in Basra prior to Iraq's invasion of Kuwait. The Claimant has not used any of its diplomatic premises in Iraq since 2 August 1990 as a result of the absence of diplomatic relations between the States of Kuwait and Iraq.

54. In its submission to the Commission, Iraq concedes that the "two buildings are Kuwaiti property that Kuwait can use after the resumption of the normal relations between the two countries" and states that the "status of these two buildings is similar to the status of the Embassies of other states which severed their diplomatic relations with Iraq".

55. In the First "F" Report, the Panel considered a claim by a Government for the loss of rent that it had prepaid on its Embassy in Kuwait City, which was not used during the period of Iraq's occupation of the city. The Panel found that "the mere permanent or temporary closure of a diplomatic mission, even in time of armed conflict, does not give rise to a claim for compensation". 8/ In such situations, under article 45 of the Vienna Convention on Diplomatic Relations of 1961, the only obligation of the

receiving State, even in the case of armed conflict, is to "respect and protect the premises of the mission, together with its property and archives". 9/

56. Accordingly, the Panel does not consider the Claimant's loss of use of its Embassy building and Ambassador's residence in Baghdad or its loss of use of its previously damaged Consulate building in Basra to constitute a direct loss within the meaning of paragraph 16 of resolution 687 (1991). For the same reasons, the Panel does not consider the rent that the Claimant prepaid on its Basra Consulate office to constitute a direct loss.

(b) Payment or relief to others

57. The Ministry claims it was required by the Government of Kuwait to pay the salaries of its employees for the period of the occupation and three months thereafter, "even though it did not receive the benefit of their services during the period". Although submitted as a claim for payment or relief to others, the payments made by the Ministry several months after 2 March 1991 did not cover the type of "temporary and extraordinary living expenses that result from individuals' departure from Kuwait or Iraq or their inability to return to those countries during the period 2 August 1990 to 2 March 1991," which the Panel has determined are compensable by the Commission under this loss type. 10/

58. The payment of salaries by the Ministry to its employees cannot as such be considered to result directly from Iraq's invasion and occupation of Kuwait within the meaning of paragraph 16 of resolution 687 (1991) because the Ministry would have incurred this salary expense in any event. 11/

59. The only conceivable loss to the claimant could be the loss of the value of the services for which the salaries were paid. However, the claimant did not seek compensation for such a loss, and such a loss would be very difficult to assess. Moreover, it is questionable whether there was any further need for such services at the time given the circumstances of the occupation.

(c) Public service expenditure

60. The Ministry requests compensation for the costs incurred "since liberation re-creating the record of Kuwait's treaties with Iraq, which were stolen or destroyed ..." Reference to the documents in support of this loss show, however, that the payments were made "for experts of demarcating borders between Kuwait and Iraq, for the previous phase of their work and the coming one that requires legal monitoring and the information campaigns". The documents also show that other payments under this loss type were made for "diplomatic activity in some of the sisterly and friendly countries, at Ambassadorial level to explain the details,

considerations, and effects of the decree of the Security Council No. 833 regarding demarcation of borders of Kuwait and Iraq".

61. In order to determine if any of the funds spent on the border demarcation project related to "re-creating the record of Kuwait's treaties with Iraq," by a procedural order the Panel requested that the Claimant "provide the name of the experts in Paris, France who were engaged for the ... project and to produce detailed billing statements from such experts relating to their work". The Claimant did not, however, provide any of this information to the Panel.

62. The Panel does not consider payments made with respect to expert and diplomatic activity involved in the demarcation of Kuwait's borders to constitute direct losses within the meaning of paragraph 16 of resolution 687 (1991). The demarcation of Kuwait's borders with Iraq is an issue that has been the subject of a long-running dispute between the two States that pre-dated the invasion and an operation which could have taken place at any time, irrespective of the invasion, 12/

3. Direct losses

(a) Real property

63. The Ministry seeks compensation for the costs it incurred in repairing and rebuilding its Kuwait City headquarters following the liberation of Kuwait. Given the fact that it is undisputed that Iraq took control of the Ministry's headquarters building during its occupation of Kuwait, the Panel considers the causal link between this loss and Iraq's invasion and occupation to have been established. Accordingly, the Panel decides that the repair costs incurred by the Claimant should be compensated to the extent they are adequately supported by documentary and other appropriate evidence.

(b) Tangible property

64. The Ministry also seeks compensation for tangible property losses arising out of the loss or damage to its library collection, transportation vehicles, computer and microfilm equipment, communications equipment, headquarters building furniture and fixtures, air conditioning units and other machinery, other office equipment and supplies, and special gifts to be given to visiting foreign dignitaries. For the same reasons that the Panel finds that the repair costs for the Ministry headquarters should be compensated, it decides that the Claimant's tangible property losses set out in this paragraph should be compensated to the extent that they are adequately supported by documentary and other appropriate evidence.

(c) Public service expenditure

65. The Ministry claims that immediately following the liberation of Kuwait, it was required to hire several additional clerical workers to perform archival work that had previously been done by a computer that was stolen during the occupation. The additional clerical workers were employed until a new computer could be purchased and installed by the Ministry. The Panel considers that a causal link between this additional expense and the loss of the Claimant's computer has been established by the Claimant. Accordingly, the Panel decides that the cost of performing manual archival work should be compensated to the extent that it is for a reasonable period and it is adequately supported by documentary and other appropriate evidence.

B. Kuwait University

1. Indirect losses

66. Several of the losses within the University's claim do not constitute direct losses within the meaning of Security Council resolution 687 (1991).

(a) Real property

67. The University seeks compensation for the costs the Claimant incurred in repairing its facilities that were damaged during Iraq's invasion and occupation of Kuwait. The amount claimed is based on the cost of 167 repair contracts entered into by the University following the liberation of Kuwait.

68. In its review of the contracts, the Panel identified two types of work that did not relate to the repair of the damage caused by Iraq's invasion and occupation of Kuwait. First, the Panel identified two contracts for new projects that the relevant University witness conceded did not relate to the repair of damage caused during the invasion and occupation. Second, the Panel learned that prior to the invasion of Kuwait, the University had maintained a large in-house maintenance staff. Following the liberation of Kuwait, the University substantially reduced its maintenance staff and contracted much of the work that had previously been handled in-house to private firms. The Panel's review of the repair contracts revealed that components of certain contracts included on-going and future maintenance work that was not part of the repair of occupation-related damage.

69. Neither new University building projects nor regular post-liberation maintenance work contracted to private firms can be considered to constitute direct losses within the meaning of paragraph 16 of resolution 687 (1991).

(b) Contract

70. The University also claims compensation for contract interruption losses. The Claimant alleges that two construction projects were in progress at the time of the invasion. On 27 January 1991, the Government of Kuwait, operating in exile, decreed that all public works contracts in Kuwait, including the two University contracts, were terminated due to an alleged force majeure, effective on 2 August 1990. Following the liberation of Kuwait, the University entered into new contracts with the construction firm that had been working on the projects at an increased price. It now seeks the difference in price between the terminated contract and the new contract.

71. The University does not address the legal implications arising out of the fact that the Government of Kuwait, not the contractor, terminated the contracts before they were completed. It seeks to demonstrate that the increased cost of its two construction projects results directly from Iraq's invasion and occupation by merely submitting the "before" and "after" contracts.

72. The Panel considers that such evidence alone is insufficient to establish the necessary causal link between the invasion and the increased price. The new contract price could have resulted from a number of intervening factors not necessarily linked to the invasion, such as a change in market conditions, the realization by the contractor that it had under-bid on the earlier contracts or the shortage of labour in Kuwait following liberation due to new immigration policies adopted by Kuwait. Whatever the actual reason for the increase in price, on the record before it, the Panel is unable to conclude that the contract interruption loss asserted by the University constitutes a direct loss within the meaning of Security Council resolution 687 (1991).

2. Direct losses

(a) Real property

73. As noted above, the University seeks compensation for the costs it incurred in repairing the damage to its facilities following the liberation of Kuwait. In its response to the claim, Iraq argues that real property damage to the University was caused by any of several groups of persons, including non-Kuwaiti employees of the University, Kuwaiti resistance or armed forces engaged in battle but not by Iraqi officials. Regardless of who caused the damage to the University's real property, it is clear from the extensive record before the Panel that the damage occurred during the period of the occupation of Kuwait. Accordingly, for the same reasons that the Panel finds that the repair costs for the Ministry headquarters should be compensated, it decides that the University's real property losses should be compensated to the extent that they are adequately supported by documentary and other appropriate evidence. 13/

IV. OTHER ISSUES

A. Currency exchange rate

74. According to the Claimants, their losses were incurred in Kuwaiti dinars, but they converted them to dollar amounts for the purpose of presenting their Claims to the Commission. Therefore, the Panel is required to determine if the rate used by the Claimants is appropriate. In the First "F" Report the Panel decided that applying the currency exchange rate as of the date of loss is the best method under these circumstances for calculating the rate of exchange. In that report, the Panel used "16 November 1990, the midpoint of the occupation period, as the date of loss for the purposes of the application of currency exchange rates". 14/ Due to the significant disturbance of the exchange rate for the Kuwaiti dinar during the period of the occupation, for losses in that currency, the Panel used the exchange rate that prevailed immediately prior to the invasion. 15/

75. The patterns of losses in these Claims are similar to those covered in the First "F" Report. The Claimants here, however, measure their losses by the cost of repairing and restoring their facilities, which they incurred during the years following the liberation of Kuwait. And, they use the weighted-average exchange rate of the fiscal year in which they estimate that the payments were made. The expert consultants who assisted the Panel have reviewed the issue in relation to the Claims and have suggested that using this method, a weighted-average exchange rate of US$3.4255: KD 1.00 would be appropriate. This rate is less than the rate of US$3.46: KD 1.00 prevailing on 1 August 1990. Consequently, in order to avoid providing the Claimants with more compensation than requested, and in accordance with their own argument regarding the proper rate of exchange to apply, the Panel has adopted the rate of US$3.4255: KD 1:00. 16/

B. Interest

76. In decision 16, the Governing Council has decided that "[i]nterest will be awarded from the date the loss occurred until the date of payment at a rate sufficient to compensate successful Claimants for the loss of use of the principal amount of the award". 17/ The Governing Council reserved, however, the authority to decide the method of calculating interest on the Commission's awards. 18/ Thus, the Panel is only required to set the date from which interest will run. For the same reasons that the Panel used 16 November 1990 as the date of loss for the purpose of interest calculation in the First "F" Report, it determines that interest should be awarded on the Claims as of that date.

V. QUANTIFICATION OF THE CLAIMS

77. As discussed above, the Panel decides that certain loss elements within the Claims should not be compensated because they failed to meet

either the Commission's pleading and evidentiary standard or the directness requirement formulated in resolution 687 (1991).

78. With respect to the loss elements that the Panel finds to be compensable, the Panel was required to verify that the losses had in fact occurred and then quantify such losses. The Panel was assisted in this effort by expert loss adjusting consultants and the secretariat. Initially, the Panel undertook a careful examination of the statements of claim and evidence filed by the Claimants. The Panel then required the Claimants to answer detailed questions and to produce additional documents that it deemed necessary to verify the circumstances and amount of the alleged losses.

79. Subsequently, the inspection team mentioned in paragraph 7 above held an on-site inspection at the headquarters of the Ministry and at the various campuses of the University. The team inspected the repairs that had been made to various buildings at the Ministry and University, interviewed witnesses who had personal knowledge regarding the damage underlying the Claims as well as witnesses who had knowledge regarding the building repair and maintenance projects that were undertaken by the Claimants following the liberation of Kuwait.

80. With respect to the University's real property damage claim, the inspection team reviewed every repair contract valued in excess of KD 100,000. For repair contracts under KD 100,000, the team reviewed a sample of 45. The sample contracts were selected on the basis of their size and repair category. Thus, the contracts for the largest amounts were included in the sample, as well as the contracts that were most likely to include indirect costs such as future maintenance work. In total, the team reviewed contracts worth approximately 92 per cent of the value of all of the contracts underlying the University's real property damage claim.

81. Upon completion of the inspection, the team reported to the Panel at a meeting in Geneva. Additionally, the Panel was presented with videotape evidence made by the team in Kuwait and reviewed other documentary evidence that was obtained during the inspection.

82. Finally, the arguments and evidence submitted by Iraq in its responses were considered by the Panel and, where applicable, were taken into account in the Panel's quantification of the Claims.

83. In quantifying the losses, the Panel weighed the amount and type of evidence submitted in support of the alleged losses and received advice from the loss adjusters regarding the amount and type of evidence that they would normally expect a Claimant to put forward in comparable catastrophic situations. The Panel also considered general loss adjustment principles such as the reasonableness of the cost of contracts, depreciation and betterment in deciding upon the amounts it should recommend in compensation. Again, the Panel was assisted by the expert consultants who,

having inspected the premises of the Claimants and the documents underlying the Claims, offered advice as to the proper amount of depreciation and betterment that should be factored into such items as air-conditioners and internal and external surface paint.

84. Based upon its review and evaluation of the Claims, the Panel makes the following determinations with regard to their quantification, which are summarized by loss classification in the tables below. The amounts have been rounded to the nearest United States dollar.

Ministry of Foreign Affairs			
Sub-claim	Loss elements	Amount claimed (US$)	Amount recommended (US$)
Real property	Repairs to headquarters building	2,480,744.00	1,252,066.00
	Real property in Iraq	8,229,730.00	0.00
Tangible property	Historical documents	33,122.00	0.00
	Library collection	1,921,749.00	1,032,140.00
	Transportation vehicles	743,858.00	405,733.00
	Computer and microfilm equipment	2,138,860.00	610,191.00
	Communications equipment	631,458.00	531,524.00
	Headquarters building furniture and fixtures	994,367.00	927,305.00
	Air conditioning units and other machinery	339,580.00	195,837.00
	Other office equipment and supplies	228,313.00	111,343.00
	Tangible property in Iraq	714,355.00	0.00
	Gifts and currency	3,865,191.00	455,337.00
Payment or relief to others	Retroactive payment of salaries to employees	8,882,582.00	0.00
Public service expenditure	Manual archiving of documents	244,202.00	123,318.00
	Border demarcation activities	1,500,000.00	0.00
	Post liberation diplomatic missions	2,000,000.00	0.00

Total			34,948,111.00	5,644,794.00
Kuwait University				
Sub-claim	Loss elements	Sub-loss elements	Amount claimed (US$)	Amount recommended (US$)
Real property	Contracts in excess of KD100,000		17,381,787.00	10,700,433.00
	Contracts below KD100,000	Air conditioning	2,304,927.00	953,499.00
		General repairs	2,759,021.00	2,154,611.00
		Landscaping	18,748.00	18,669.00
		Mechanical electrical repairs	1,497,432.00	924,725.00
		Painting work	232,551.00	115,786.00
		Replacement work	396,270.00	341,279.00
	Unrelated contracts		39,988.00	0.00
Contract	Interrupted contracts		632,462.00	0.00
Total			25,263,186.00	15,209,002.00

85. Based on the foregoing, the Panel recommends that the following amounts should be paid to the Government of Kuwait in compensation for losses incurred by the Claimants as a direct result of Iraq's invasion and occupation of Kuwait:

(a) Kuwait Ministry of Foreign Affairs: US$5,644,794.00;

(b) Kuwait University: US$15,209,002.00.

Geneva, 30 January 1998

(Signed) Bjørn Haug
Chairman

(Signed) Georges Abi-Saab
Commissioner

(Signed) Michael J. Bonell
Commissioner

Notes

1/ Governing Council decision 10, "Provisional Rules for Claims Procedure" (S/AC.26/1992/10).

2/ "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Instalment of Claims by Governments and International Organizations (Category 'F' Claims)" (S/AC.26/1997/6).

3/ Governing Council decision 45, "Decision Concerning Part One of the First Instalment of Claims by Governments (Category "F" Claims) taken by the Governing Council of the United Nations Compensation Commission" (S/AC.26/Dec.45 (1997)).

4/ Governing Council decision 7, "Criteria for Additional Categories of Claims" (S/AC.26/1991/7/Rev.1).

5/ See First "F" Report, paras. 47-64.

6/ Ibid., para. 81.

7/ See First "F" Report, para. 58.

8/ Ibid., para. 74.

9/ Vienna Convention on Diplomatic Relations of 1961 (United Nations, Treaty Series, vol. 500) p. 95.

10/ First "F" Report, para. 84. The Kuwait Ministry of Finance, on the other hand, has, in a separate claim, sought compensation for the money it expended to cover "living and housing expenses in the countries where Kuwaitis sought refuge, the extra medical expenses that had to be paid for Kuwaitis requiring treatment abroad during the occupation and extraordinary educational expenses for Kuwaiti students abroad during the occupation." The Ministry of Finance's claim will be considered by the Commission in due course.

11/ See also, for example, "Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim" (S/AC.26/1996/5) (the "WBC Claim Report"), para. 162 ("Considering that the fire-fighting personnel in question appear to have been regular staff members of KOC, the Panel is of the opinion that the Claimant would have had to make such salary payments even if there had been no invasion.").

12/ Indeed, in the Ministry's statement of claim, it is acknowledged that in negotiations that were taking place between Kuwait and Iraq in the days prior to Iraq's invasion, Iraq had "renewed old territorial claims relating to oil reserves in Northern Kuwait which had been unsuccessfully asserted by Iraq in years past".

13/ See First "F" Report, paras. 71-73. See also, for example, WBC Claim Report, paras. 85-86.

14/ First "F" Report, para. 101.

15/ Ibid., para. 102.

16/ Ibid., para. 102 n. 46 (The Panel adopted a similar approach in the First "F" Report in order not to over compensate the Sri Lankan claimant.).

17/ Governing Council decision 16, "Awards of Interest" (S/AC.26/1992/16), para. 1.

18/ First "F" Report, para. 103.